

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION MAR 18 1996
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the Cable) MM Docket No. 92-260
Television Consumer Protection)
and Competition Act of 1992:)
)
Cable Home Wiring)

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits these comments in response to the First Order on Reconsideration and Further Notice of Proposed Rulemaking ("Further Notice") in the above-referenced proceeding. OpTel, through its subsidiaries, operates private and franchised cable systems in several regions of the United States. OpTel is, today, competing with franchised cable operators and hopes to be able to compete more effectively in the future, as the Commission rationalizes its home wiring rules for the age of convergence.

In the Further Notice, the Commission revised its rules regarding the procedures a cable operator must follow when a subscriber terminates service. Further, the Commission requested comment on several aspects of its inside wiring rules, including whether the inside wiring rules should apply to loop-through wiring in multiple dwelling units ("MDUs") and whether MDU owners should have greater access to cable inside wiring.

The issues raised by the Commission in the Further Notice are of critical importance to OpTel and other new entrants into the market for multichannel video programming distribution ("MVPD"); a market that the Commission has found to be highly concentrated and controlled by dominant, franchised cable operators.¹

¹ In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, ("Second Annual Report") CS Docket No. 95-61, ¶ 215 (rel. Dec. 11, 1995) ("In most local markets, a single cable system remains the primary distributor of multichannel video programming services.").

No. of Copies rec'd 0+11
List ABCDE

As the Commission knows, MDUs are among the most hotly contested competitive battlegrounds in the video distribution marketplace. MDUs offer sufficient concentrations of subscribers to justify the investment that multichannel video programming distributors must make in facilities in order to compete with the franchised cable operators.

In order for competition to flourish in the MDU market, however, customers must have flexibility to switch between and among competing service providers. By imposing more rigorous inside wiring service-termination procedures on franchised cable operators, the Commission's new rules will help to make inside wiring more accessible to consumers. This accessibility, in turn, will help to ensure that consumers are not required to suffer long service interruptions or disruptive, new interior construction when they decide to switch service providers. This important first step, however, must be followed with additional measures to enhance competition in the local distribution of video programming, if the dominant, franchised cable industry is to be challenged effectively.

To that end, OpTel urges the Commission to: (1) consider, for inside wiring purposes, each MDU with loop-through wiring as a single premises; (2) make clear that post-termination vacation of the premises by a subscriber does not affect a franchised cable operator's obligation to adhere to the inside wiring termination procedures; and (3) revise its rules to allow the owner of the premises to purchase inside wiring when the subscriber merely is renting the premises.

DISCUSSION

I. THE COMMISSION'S PROCEDURES FOR THE DISPOSITION OF INSIDE WIRING UPON TERMINATION OF SERVICE WILL INCREASE CONSUMER CHOICE AND ENHANCE COMPETITION IN THE MVPD MARKET.

Restrictions on consumer access to cable home wiring in MDUs make it extremely impractical, and in some cases impossible, for alternative providers of video programming to compete for subscribers in MDUs. Without access to MDU cable inside wiring, competitors are required to overbuild the entire cable system within the MDU. In the 1992 Cable Act, Congress sought to reduce this barrier to entry by providing competitors with access to existing cable system inside wiring.²

² See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Sections 2(a)(6), 2(b)(1-2), 106 Stat. 1460 (1992). Although the inside wiring

Effective access to inside wiring, Congress determined, would allow subscribers to switch from a cable operator to a competitor without undue delay or disruption of service.

If such a legal right of access is to be meaningful, of course, the subscriber must actually be made aware of his or her rights with respect to the wiring. The Commission's new procedures concerning the disposition of cable inside wiring upon service termination address this issue precisely. The Commission will now require, upon initial notice of termination, that the franchised cable operator inform the subscriber that the operator owns, and intends to remove, the inside wiring and that the subscriber has the right to purchase the wiring at a specified price.³ Failure by the cable operator to follow these procedures, or to remove its wiring within seven days (if the wiring is not purchased by the subscriber), will result in the immediate relinquishment of any ownership interest the cable operator may have had in the inside wiring.⁴

These revisions to the Commission's service termination procedures constitute an important step toward increasing the level of competition in the MVPD marketplace. The Commission's previous rules, which allowed incumbent cable operators to wait up to thirty days after termination to remove inside wiring, unnecessarily burdened consumers seeking to switch service providers. Under the new rules, consumers will have more information, at an earlier time, regarding the ultimate disposition of cable inside wiring in their homes.

It is OpTel's experience, however, that cable operators sometimes attempt to discourage subscribers from switching service providers, prior to any election to terminate, by threatening them with removal of their inside wiring if the subscriber negotiates with a competitor. The subscriber is not told that he or she will have the right to purchase the inside wiring upon termination. Indeed, in some cases, the cable operator may not actually own the inside wiring, but the subscriber may have no way of knowing that.

termination procedures only apply by their terms to "cable systems," OpTel generally abandons all broadband wire that it installs in MDUs at the termination of its right-of-entry agreements.

³ Further Notice ¶ 18.

⁴ Id. ¶¶ 18-21. The Commission should also make clear that "removal" requires just that — the actual removal of the wiring from the premises — and not the mere disabling of the wiring so that another provider cannot use it.

To ensure further that consumers have complete information necessary to make informed decisions, the Commission should require cable operators to state affirmatively, on any occasion on which the cable operator states an intention to remove inside wiring (not only upon notice of termination by the subscriber), whether such operator does, in fact, own the inside wiring. If so, the cable operator should be required to inform the subscriber that he or she will be given an opportunity to purchase that wiring upon service termination. In combination with the Commission's new procedures, this change will help to reduce one of the largest barriers to entry into the MVPD market — consumer fears that switching service providers will be unduly costly or disruptive.

II. EFFECTIVE ACCESS TO MDU CABLE INSIDE HOME WIRING IS NECESSARY TO FULL DEVELOPMENT OF COMPETITION IN THE MVPD MARKET.

Despite the important first step that the Commission has take in the Further Notice to improve consumer access to cable inside wiring, significant issues remain that may have a profound impact on the future development of competition in the MVPD market. In the Further Notice, the Commission has sought comment on several of these issues.⁵

A. For Inside Wiring Purposes, Each Loop-Through MDU Should Be Deemed To Be A Single Premises.

The Commission has sought comment on whether owners of MDUs with loop-through wiring should have the right to purchase MDU inside wiring when all the subscribers in the MDU want to switch to a new service provider.⁶ For the reasons set forth below, OpTel proposes that MDUs with loop-through wiring should be deemed to be a single premises and owners of such MDUs should be allowed to purchase cable inside wiring upon termination of service from a franchised cable operator.

⁵ The balance will be addressed in the Notice of Proposed Rulemaking in Telecommunications Services Inside Wiring: Customer Premises Equipment, CS Docket No. 95-184 (rel. Jan. 26, 1996).

⁶ Further Notice ¶ 40. The Commission also has asked whether it should prohibit all future installations of loop-through wiring. For service and technical reasons, OpTel does not install or use loop-through configurations, but rewires MDUs at which it encounters such wiring. The Commission, however, has established no compelling need for such a prohibition and, therefore, should avoid unnecessarily burdening private property rights by limiting the manner in which property owners may wire their buildings.

The Congress has required the Commission to “prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.”⁷ Given the nature of the loop-through wiring configuration, however, there is little, if any, value in giving individual subscribers the right to purchase the wiring inside their residences. A decision to switch service providers must be made collectively or not at all. Where units are owned (condominiums and co-ops) such collective action normally is governed by specific rules or bylaws and executed by an authorized owner representative or managing agent. In rental units, of course, tenants have no personal financial stake in the rental unit and have little or no incentive to purchase inside wiring. Service decisions are therefore made by the building owner or manager on behalf of the tenants.

In the interests of efficiency, and because individual subscribers in loop-through MDUs have no incentive to purchase their inside wiring, OpTel urges the Commission to extend its inside wiring rules to loop-through MDUs and to allow such an authorized subscriber representative or MDU owner to have access to all of the cable inside wiring in the MDU. The Commission’s statutory authority to establish rules for the disposition of cable system wiring on the subscriber’s “premises” is sufficiently broad to support such a requirement. Because of the countless ways in which people organize their living arrangements, no single application of the term “premises” will account for all possible scenarios. In loop-through MDUs, the separate residential units to which the cable signal is delivered are inextricably interrelated. Since no single resident can change services without all others changing, there is no benefit to establishing a demarcation point in loop-through MDUs at the wall of each subscriber’s unit.

In this situation, therefore, the Commission should deem the entire MDU to be the relevant “premises” for inside wiring purposes. Such a rule would foster competitive entry and would provide subscribers with the maximum degree of flexibility in their service choices.

Further, as the Commission has recognized, there is no reason that subscribers should not be able to exercise their inside wiring rights through

⁷ 47 U.S.C. § 544(i).

authorized agents.⁸ Subscribers in loop-through MDUs should be allowed to use their collective bargaining power *vis-a-vis* video programming distributors and act through authorized agents or representatives to negotiate a service agreement for the entire MDU.

Accordingly, the agent, acting on behalf of each subscriber in the MDU, should be allowed to purchase, at replacement cost, all cable wiring inside and within 12 inches of the minimum point of entry of the MDU following the voluntary termination of service for the MDU by the authorized subscriber agent. This would maximize consumer choice, increase subscriber bargaining power, and enhance competition in the MVPD market.⁹

B. Subscriber Vacation Should Not Affect Application Of The Inside Wiring Termination Procedures.

In the Further Notice, the Commission asked whether the inside wiring rules should require cable operators to relinquish subscriber inside wiring if, upon termination, the subscriber does not elect to purchase the inside wiring and vacates the premises prior to the expiration of the seven-day removal period.¹⁰ The Commission tentatively has concluded that "whether the subscriber vacates the premises has no bearing on the application of [the inside wiring] rules."¹¹ OpTel agrees with this conclusion.

The competitive goal of the cable inside wiring rules would be defeated if cable operators were not bound by these rules in MDUs comprised of rental units (at which many subscribers would be compelled to vacate the premises prior to the running of the seven-day removal period). Moreover, as long as the cable operator has an opportunity to remove the wiring within the seven-day period, the cable

⁸ See Further Notice ¶ 18.

⁹ For these same reasons, the Commission should reject the suggestion that the inside wiring rules should not apply when the owner of an MDU terminates cable service for the entire building in favor of an alternative multichannel video programming service provider. See Further Notice ¶ 41. Although the Commission's rules require that subscriber termination be "voluntary," the voluntariness requirement was added as a means for cable operators to protect themselves against theft of service. See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring, 8 FCC Rcd 1435, 1436 (1993). That requirement should not be used as a sword to thwart the development of competition.

¹⁰ Further Notice ¶ 42.

¹¹ Id.

operator is no more or less burdened by the termination provisions when the subscriber has vacated the rental unit. Thus, subscriber vacation of the premises should have no affect on the rights and obligations of cable operators with respect to their inside wiring.

C. MDU Owners Should Be Allowed To Purchase The Inside Wiring In Their Rental Units Upon Service Termination.

Finally, the Commission requested comment on whether, “when the subscriber voluntarily terminating cable service does not own the premises, the premises owner should have the right to purchase the cable home wiring.”¹² OpTel urges the Commission to adopt rules providing for owner-access to cable inside wiring in rental MDUs.

To give full effect to the inside wiring rules, the Commission should deem MDU owners as the relevant subscribers in MDUs comprised of rental units, for inside wiring purposes, and allow them to purchase cable inside wiring. Such an interpretation of an ambiguous statutory term is fully within the Commission’s authority and will better satisfy congressional intent.

Many of the MDUs in the MVPD market are comprised of rental units with relatively high rates of turn-over among tenants. Because they do not own the unit, however, these renter-subscribers have little or no incentive to purchase inside wiring upon service termination. Although the cost of inside wiring generally is not high, it is to the renter a sunk-cost. Absent some independent agreement with the MDU owner or an alternative video service provider, the renter will never recover the purchase price of the inside wiring. Consequently, the wiring in MDUs with rental units most often remains the cable company’s and each consecutive new tenant is, initially at least, a captive subscriber.

The MDU owner, by contrast, has a long term interest in the building and the services available to it. The owners of rental apartment buildings must compete for tenants in the fiercely competitive residential real estate market. The quality of the telecommunications and video services available on the property is one factor on which they compete. In this context, therefore, the long term interests of the residents of a rental apartment MDU are better served by a rule

¹² Id.

that vests the owner of the MDU with control over the wiring and broadband services in the building.

For that reason, MDU owners should be given the option to acquire cable inside wiring in rental apartment buildings when a tenant or the entire building terminates service.¹³ Once the MDU owner has such ownership and control over the inside wiring, new tenants easily can be connected for service from the previous provider or, where an alternative service provider has installed a common wire in the building, the new service provider can be given easy access to the residents without undue delay.¹⁴

CONCLUSION

The Commission's new service termination procedures will help to make subscribers informed consumers in the MVPD market. To promote competition in the market further, however, the Commission should: (1) consider, for inside wiring purposes, each MDU with loop-through wiring as a single premises; (2) make clear that post-termination vacation of the premises by a subscriber does not affect a franchised cable operator's obligation to adhere to the inside wiring termination

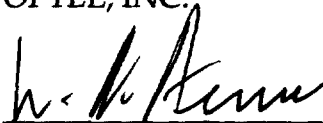
¹³ MDU owner control of cable inside wiring in rental apartment buildings also will help to mitigate safety concerns. In rental MDUs, the property owner remains responsible for maintenance of the common areas and for building security. If tenants are given access to cable inside wiring, it will be more difficult for property owners to ensure the proper installation and maintenance of that wire, and to control access to the building by service provider personnel.

¹⁴ The proposed change in the rules should make no meaningful difference to the incumbent provider. Once termination has occurred, the incumbent will not be providing service to the subscribers and the balance of the drop is useless to them. Conversely, the drop wiring is extremely valuable to the competitor that will be providing service to the unit.

procedures; and (3) permit MDU owners to purchase cable inside wiring in rental units.

Respectfully submitted,

OPTEL, INC.

A handwritten signature in black ink, appearing to read "H. K. Ferree", is written over a horizontal line.

Henry Goldberg
W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT

1229 Nineteenth Street, NW

Washington, DC 20036

(202) 429-4900

Its Attorneys

Counsel:

Michael E. Katzenstein

Vice-President and General Counsel

OpTel, Inc.

1111 W. Mockingbird Lane

Dallas, TX 75247

March 18, 1996